

CJEU Opens the Door for the Commission to Reconsider Charges against Poland

VB verfassungsblog.de/cjeu-opens-the-door-for-the-commission-to-reconsider-charges-against-poland/

Maciej Taborowski Di 13 Mrz 2018

Di 13 Mrz 2018

In the *Associação Sindical dos Juízes Portugueses* judgment the Court of Justice of the European Union (CJEU) deemed that on the basis of Article 19(1) TEU it is competent to evaluate the guarantee of independence of judges if only they sit in a national court that may apply and interpret EU law. In light of this ruling, the European Commission in the infringement proceedings against Poland does not have to restrict itself to the slightly modified “Hungarian scenario” (hitherto preferred by it). It may instead once again analyse the scope of charges with regard to the Common Courts System Act (the CCS Act), and may even lodge a new complaint concerning i.a. the Act on the Supreme Court.

(1) It is remarkable how quickly and flexibly the CJEU has reacted in its legal decisions to the crisis of rule of law in certain EU Member States. Above all, it has built up in its case law a catalogue of elements constituting the rule of law within the meaning of Article 2 TEU, such as the principle of division of power (C-477/16 *Kovalkovas*), the principle of effective judicial protection (C-72/15 *Rosniewt*), and effective application of EU law (C-441/17 R *Commission v. Poland*). Following this last order of the CJEU, it may be seen that the CJEU does not hesitate to issue courageous decisions securing the effectiveness of EU law, e.g. by way of interpretation of Article 279 TFEU allowing of penalty payments for not respecting the CJEU order for interim measures regarding Poland’s *Puszczza Białowieska* site. Just such a courageous decision is also undoubtedly the judgment in the case *Associação Sindical dos Juízes Portugueses*, which may have a precedent-setting character of constitutional importance for the European Union and EU Member States. For the first time the CJEU stated that Article 19(1) TEU (principle of effective judicial protection), in itself, enables – under certain conditions – review of national legislation as regards the standard of independence of judges (confirmed by Article 47 of the Charter of Fundamental Rights of the EU). This type of control will be possible if national courts (in the meaning of Article 267 TFEU) can interpret or apply EU law.

(2) In *Associação Sindical dos Juízes Portugueses* the national court (*Tribunal de Contas*), from which the judges originated who challenged the decisions issued with regard to them concerning a decrease of remuneration (which supposedly infringed their independence), could decide both cases without a EU element, and those which contain such an element (e.g. cases concerning funds coming from the EU, as well as issues related to public expenditure or the public debt, in particular as part of procedures for allocating public contracts). In other words, the fact that the national court had the competence to potentially apply or interpret EU law was sufficient to accept that the guarantees concerning its independence are covered by EU law according to Article 19(1) TEU. It seems therefore that in that case, in order to evaluate the independence of a national court, it is not necessary to show an EU element following from sources (e.g. a directive or one of the freedoms of the EU internal market) other than the possibility of applying EU law, which itself triggers Article 19(1) TEU. In particular, the CJEU did not accept that the potential EU

background of the provisions themselves decreasing the judges' remuneration is of importance in this regard (related in a way to the requirements of an excessive budget deficit and the EU financial assistance programme).

(3) The judgement *Associação Sindical dos Juizes Portugueses* thus shows that the CJEU has an express Treaty competence to evaluate judicial systems in the EU Member States, while the courts' structure of the Member States should be prepared 'in advance' for a situation where the national courts were entrusted to decide also cases concerning EU law. This preparation assumes that the courts meet the standard of independence required by EU law (Article 19(1) TEU/Art. 47 CHFF). This is the case in view of the key role of national courts in the EU system of legal protection. In the opinion of the CJEU, Article 19 TEU gives a concrete expression to the value of the rule of law stated in Article 2 TEU, as well as secures the mutual trust between the courts of the Member States that the values expressed in Article 2 TEU will be complied with. The CJEU also emphasized the key role played by national courts for the EU system of legal protection, application and respect for EU law, as well as for the protection of individuals (i.e. *inter alios*, natural persons and legal entities). Since individuals have the right to challenge each act concerning application of EU law, Member States have the task, pursuant to the principle of loyalty (Article 4(3) TEU), to establish a system of remedies and procedures which ensure effective judicial protection. In "areas covered by EU law", in the meaning of Art. 19 (1) TEU, national courts must therefore meet EU standards of independence. It seems to follow from *Associação Sindical dos Juizes Portugueses* that the CJEU will evaluate differently the scope of application of Art. 19(1) TEU and the CHFR (Art. 51 CHFR). This is because Art. 19(1) TEU covers also situations in which national courts may potentially apply EU law, whereas the CHFR pertains only to cases of actual application of EU law by the Member States.

(4) The judgment *Associação Sindical dos Juizes Portugueses* opens new prospects for the European Commission in its fight for the rule of law in Poland with regard to infringement proceedings (Art. 258 TFEU). This judgment may induce the Commission above all to once again consider the scope of charges which the Commission intends to bring against Poland in relation to the Act on Common Courts (hereinafter: "the ACC"). As I have written elsewhere, it follows from the brief press release of the EC of 20.12.2017 that in the context of the ACC the Commission intends to bring charges against Poland – in proceedings for a declaration of an infringement of the obligations following from the Treaties – concerning (a) a breach of the ban on discrimination for reason of age in the case of retirement age of judges, and (b) a breach of the independence of the national courts (art. 19 (1) TEU/Art. 47 CHFF) in relation to the consent which the Minister for Justice expresses (according to discretionary criteria) to the continued holding of a position by a judge who has reached retirement age. With regard to these charges the EU element (and the possibility of an evaluation of independence according to EU standards) is found above all in Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

(5) In light of earlier press releases, at the prejudicial stage of the art. 258 TFEU proceedings the Commission, pointing to a breach of art. 19 (1) TEU/art. 47 CHFF, also voiced reservations concerning the provisions of the ACC which allow the Minister for

Justice to appoint and remove, at his discretion, presidents (vice presidents) of courts. In the release of 12.09.2017 in relation to the issue of the reasoned opinion the EC stated that the “discretionary power to dismiss and appoint Court Presidents allows the Minister of Justice to exert influence over these judges when they are adjudicating cases involving the application of EU law”. However, already in the release issued in relation to the initiation of proceedings before the CJEU (20.12.2017) there is no reference to this national regulation. The EC did not show the reasons for which it resigned from bringing this charge. However, taking into account the hitherto case law of the CJEU, this charge could have involved significant difficulties as regards showing precisely this EU element, without which an evaluation cannot be made of the standard of independence following from Art. 19 (1) TEU/Art. 47 CHFF. The difficulty consisted in the fact that the Commission would have to show this EU element exclusively when applying the reasoning referring to the general role of the national courts in the EU legal system. This would be a task more difficult than in a situation in which a justification is available relating directly to a specific secondary legal act (directive), as in the case of the remaining charges. The judgment *Associação Sindical dos Juízes Portugueses* opens up a new perspective in this regard as the CJEU accepted that it is precisely the general role of the national courts in the EU legal system, related to the application and interpretation of EU law (in understanding and cooperation with the CJEU as part of the prejudicial procedure), which constitutes sufficient justification to examine the case as regards fulfilment of the requirement of independence following from Art. 19 (1) TEU/Art. 47 CHFF. This means that the ACC which, in principle, in the aspect relating to the appointment and removal of court presidents, in itself has no EU background and falls within the scope of exclusive competence of the Member State, will however be able to be examined as regards EU law standards.

(6) The judgment *Associação Sindical dos Juízes Portugueses* may also constitute an opportunity for the Commission to approach – in proceedings under Art. 258 TFEU – the relation of the judiciary and the executive powers in a more comprehensive way. The hitherto position of the Commission may be evaluated as fragmentary, as opposed to the evaluation presented by the Venice Commission which in its opinion of 11.12.2017 showed that the powers of the Minister for Justice should not be analysed independently, but in a certain system context (i.e. with account taken of other ministerial powers in the area of the judicial system, with regard to judges and court presidents). The Venice Commission also pointed out that the Attorney General who, as the superior of all the prosecutors appearing in courts, has a specific interest in a given resolution of a case, also holds the position of Minister for Justice, having in turn specific powers with regard to courts and individual judges. In the opinion of the Venice Commission, the combination of these factors not only increases the negative effect which is created by each of them independently, but jointly creates a serious risk for the independence of the judicial system in Poland. Undoubtedly, as seen by the Commission, in the light of the judgment of the ECHR in the case *Baka v. Hungary*, in a specific case the removal of a court president from his function may be of key importance for ensuring the independence of the judicial powers. Showing this problem in a broader context could strengthen the argumentation of the European Commission in proceedings under Art. 258 TFEU.

(7) Moreover, the judgment *Associação Sindical dos Juízes Portugueses* may allow the Commission to carry out infringement proceedings under Art. 258 TFEU with regard to a broader range of charges covered by the Recommendations of the Commission regarding the Rule of Law in Poland and by the motion of the Commission filed under Art. 7 (1) TEU, such as e.g. the new rules concerning the National Council of the Judiciary. In particular, the case *Associação Sindical dos Juízes Portugueses* makes it possible to start proceedings with regard to the Act on the Supreme Court which will enter into force on 3.04.2018. Pursuant to that Act, inter alia, the retirement age of Supreme Court (SC) judges was reduced from 70 to 65 years, which will affect about 40% of the present SC judges. In the opinion of the Commission, this will give rise to a problem in particular in the context of the principle of the irremovability of judges. What is more, the possibility of a SC judge continuing to hold his/her position will be dependent upon a discretionary decision of the President of the Republic of Poland. He may twice consent to the continued performance of the function, each time for 3 years. This gives rise to a similar problem concerning the independence of courts in light of Art. 19 TEU and Art. 47 KPP EU, as with regard to judges of common courts, which problem the EC has already made the subject of proceedings under Art. 258 TFEU. However, in the case of SC judges so far there has been no possibility to introduce the EU element following from Directive 2006/54/EC (like in the case of judges of common courts) as the SC Act does not discriminate with the retirement age as regards gender since female SC judges can voluntarily retire at 60 years of age. Also, basing the charge on a breach of the ban on discrimination for reason of age, as in the Hungarian case (C-288/12), could be difficult. To recall, Hungary removed the infringement identified by the CJEU concerning the lowering of the retirement age of judges (from 70 to 62 years of age), increasing this age to 65, which the Commission no longer questioned. The judgment *Associação Sindical dos Juízes Portugueses* opens up for the Commission new possibilities in this regard for evaluating the principles of effective judicial protection, independence of judges and their irremovability from office, in isolation from discrimination for reason of gender or age.

(8) What is more, the experience with the Hungarian cases also showed that the departure of judges from the profession and performance of the functions in view of retirement age gives rise to practically irreversible effects regarding a return to the profession and the functions performed. In the case of the Polish SC, inter alia, the First President of the SC will in this way lose her function, as well as many experienced judges. Drawing conclusions from the Hungarian case, for the effectiveness of a possible intervention by the Commission in the context of the SC Act (but also on the Common Courts Act) of key importance will be whether the Commission files a motion for interim measures by way of a suspension of application of the statutory regulations until such time as the case has been decided on by the CJEU. This is because with regard to Hungary the effectiveness of the judgment of the CJEU declaring an infringement, though issued in an accelerated procedure, proved negligible.

(9) Taking into account the potentially weak effectiveness of the procedure under Art. 7 TEU, the Commission could successfully avail itself of Art. 258 TFEU, where there is no room for political discretion. The Commission's press release of 20.12.2017 showed that the Commission did not intend, at that point, to initiate courageous and precedent-setting proceedings before the CJEU in the fight for the rule of law. But now in *Associação*

Sindical dos Juízes Portugueses the CJEU opened the door for the Commission for it to take, in proceedings under Art. 258 TFEU, a new (from the point of view of the rule of law) and more effective path than to date. The clock is ticking, in particular as regards the SC judges. It depends only on the Commission whether it will allow that the values expressed in Art. 2 TEU be merely set down on paper, or whether it will attempt to convince the CJEU that these values have – in the case of Poland – been breached. The green light shown by the CJEU could not be greener.

LICENSED UNDER CC BY NC ND

SUGGESTED CITATION Taborowski, Maciej: *CJEU Opens the Door for the Commission to Reconsider Charges against Poland*, *VerfBlog*, 2018/3/13, <https://verfassungsblog.de/cjeu-opens-the-door-for-the-commission-to-reconsider-charges-against-poland/>.